



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-1511**

CHARLES MURPHY, et al.,
Petitioners,

VS.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit

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The Petitioners, Charles Murphy, et al., pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit entered on January 5, 1979, overruling Petitioners' Motion for Recusal, the judgment and opinion of January 19, 1979, and the order of February 6, 1979, overruling the Motion for Rehearing.

OPINIONS BELOW

The order of the Court of Appeals of January 5, 1979, the decision of January 19, 1979, and the order of February 6, 1979 are not reported and appear in the appendixes to this

Petition, number 10, page A-55, number 11, pages A-56-57, and number 12, page A-58. The order of the District Court of August 11, 1978 is not reported, and appears in the appendices to this Petition as number 7, page A-46. The Memorandum Opinion of the District Court is not reported, and is set out in the appendixes to this Petition, as number 8, pages A-47-51.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered on January 5, 1979 (appendix number 10, page A-55); the judgment and order of the Court of Appeals was entered on January 19, 1979 (appendix number 11, pages A-56-57); and the Motion for Rehearing was overruled on February 6, 1979 (appendix number 12, page A-58).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the judges of the Court of Appeals, against whom a Motion for Recusal had been filed, properly overruled Appellants' Motion for the recusal of Judges Lay and Bright, which verified Motion alleged that those judges have formed a personal bias or prejudice against the actions and attitudes of a party, and that the judges have prejudged and formed opinion as to the merits of disputed evidentiary facts concerning the proceedings.
2. Whether the Court of Appeals erred in determining that the action was removable to the Federal District Court for the Eastern District of Missouri from the Circuit Court of the City of St. Louis, Missouri,

- a) When the Defendants alleged Federal Jurisdiction under the terms of 28 U.S.C. 1331 and 28 U.S.C. 1441.
- b) When the Defendants were allowed to amend their Petition for Removal after the time within which they were required to file a responsive pleading had expired and alleged federal jurisdiction under the terms of 28 U.S.C. 1343 and 28 U.S.C. 1443, and
- c) When Plaintiffs' Petition did not state separate and independent claims or causes of action.
3. Whether the Court of Appeals erred in determining that, when ruling upon a Motion to Dismiss, a District Court may consider matters beyond the Petition, including affidavits and judicial records in other proceedings.
4. Whether the Court of Appeals erred in determining that the District Court could judicially note that the numerical extent of employee assignments and transfers, based on race alone, were completely necessary to comply with a purported consent decree in a separate action.
5. Whether the Court of Appeals erred in determining that a cause of action can be barred by laches prior to the expiration of the statute of limitations, in the absence of a showing that Defendants were either damaged by or relied upon Plaintiffs' inactivity.
6. Whether an employer may use race as the sole criteria for assignment or transfer of employees in the absence of an acknowledgment or finding of prior racial discrimination by the employer.
7. Whether a federal court may judicially approve a consent decree requiring the assignment and transfer of employees solely on a racial basis in the absence of a determination that the assignment and transfer is required to overcome prior discriminatory conduct on the part of the employer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1.) 28 U.S.C. 455(a): Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(2.) 28 U.S.C. 455(b): He shall also disqualify himself in the following circumstances:

1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

(3.) 28 U.S.C. 1331(a): The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of Ten Thousand and No/100 Dollars (\$10,000.00), exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(4.) 28 U.S.C. 1343: The district court shall have original jurisdiction of all civil actions authorized by law to be commenced by any person:

3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, customer usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

(5.) 28 U.S.C. 1441:

a) Except as otherwise provided by act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the Defendant or the Defendants to the district court of the United States for the district and division embracing the place where such action is pending.

b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residents of the parties. Any other action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is pending.

c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(6.) 28 U.S.C. 1443: Any of the following civil actions or criminal prosecutions, commenced in a state court, may be removed by the Defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

2) For any act under color of authority derived from any law providing for equal rights or for refusing to do any act on the grounds that it would be inconsistent with such law.

STATEMENT OF THE CASE

The original action was filed, by verified petition, in the Circuit Court for the City of St. Louis, Missouri, the state trial court, on June 12, 1978, alleging that the Defendants, the Board of Education for the City of St. Louis, and its officers and agents and employees, had prepared and were using separate lists for the assignment and transfer of its employees, which lists were compiled and based on the race of the employees. The Petition alleged that the Plaintiffs were employees of the Defendant, Board of Education, that Defendants, Benson, Bond, Busse, Grich, Klinefelter, Moser, Nicholson, Schlafly, Smith, Springer, Weir, and Williams constituted the Board of Education of the City of St. Louis, and that Defendant, Wentz, was the Superintendent of Schools, that Defendant, Neel, was the Associate Superintendent of Schools in charge of the administration and supervision of personnel matters for the Board. The verified Petition further alleged that the Defendant, Board of Education, had classified its employees into two categories, those in a general teaching capacity and possessing a certificate issued by the State of Missouri, and all other employees who were referred to as noncertificated employees. The Petition alleged that the Board had established certain criteria in determining employee rights and procedures to be followed in the assignment or transfer of employees to job locations. State statutes and city ordinances further make certain employment practices unlawful, amongst which are the classification of employees by race and the establishment of separate lists for employees by race to be utilized in determining promotion, transfer, or assignments.

Plaintiffs alleged that the Defendants had in fact established separate lists of job locations and categories, which lists were prepared based exclusively on race, color, ancestry, and national origin of its employees, and had limited the job sites, qualifications, and locations available to its employees based

exclusively upon this discriminatory list. Plaintiffs further stated that the Defendants were assigning and threatening to assign Plaintiffs to various job sites based exclusively on their race contrary to Defendants' own established criteria, applicable municipal ordinances, State Statutes, and Federal Statutes and Constitutional provisions. On June 12, 1978 the State Circuit Court ordered the Defendants to show cause on June 29, 1978 why they should not be enjoined from assigning or threatening to assign Plaintiffs to job sites based on their race.

On June 23, 1978 Defendants filed a Petition for Removal of the cause from the Circuit Court of the City of St. Louis, Missouri to the United States District Court for the Eastern District of Missouri, Eastern Division, alleging that the Federal District Court had original jurisdiction of the cause under the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1441.

On June 27, 1978, Plaintiffs filed their Motion to Remand the cause to state court.

The Defendants made no return to the order to show cause on or before June 29, 1978, and never denied any of the allegations of the verified petition.

On July 10, 1978, eleven (11) days after the return date to the show cause order, the Defendants obtained the permission of the District Court to amend their Petition for Removal, adding as additional grounds for their Petition for Removal the provisions of 28 U.S.C. 1343(3) and (4) and 28 U.S.C. 1443(2).

On July 10, 1978, the Defendants also filed their Motion to Dismiss Plaintiffs' cause of action for failure to state a claim upon which relief may be granted.

On August 11, 1978, the Federal District Court for the Eastern District of Missouri entered an order denying Plaintiffs' Motion to Remand, sustaining Defendants' Motion to Dismiss, and

dismissing Plaintiffs' Petition with prejudice, and simultaneously entered its memorandum opinion.

Those orders were subsequently appealed to the United States Court of Appeals for the Eighth Circuit. On January 1, 1979, the composition of the panel assigned to hear the appeal was announced, designating Judges Lay, Bright, and Stephenson to hear and decide the appeal. On January 2, 1979, Plaintiffs filed a Motion for Recusal of Judges Lay and Bright, two of the three judges assigned to the panel to hear the appeal, which Motion was denied by the Court of Appeals by its order of January 5, 1979.

The panel of the United States Court of Appeals for the Eighth Circuit, per curiam, affirmed the judgment and order of the Federal District Court by its order of January 19, 1979. The subsequent Motion for Rehearing En Banc was denied by the order of the Court of Appeals of February 6, 1979.

REASONS FOR GRANTING THE WRIT

The judgment of the Eighth Circuit Court of Appeals should be reviewed because:

- A) Two of the three sitting Judges of the Court of Appeals which ruled upon this cause, improperly failed to recuse themselves in violation of 28 U.S.C. 455.
- B) The Judges of the Court of Appeals erred in determining that this action was removable to the Federal District Courts from the Missouri State Circuit Court under the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1441.
- C) The Judges of the Eighth Circuit Court of Appeals erred in determining that the amendment of the Petition for Removal, after the time within which a responsive pleading was required, was permissible, and that removal was proper under the terms of 28 U.S.C. 1343 and 28 U.S.C. 1443.
- D) The Judges of the Eighth Circuit Court of Appeals erred in determining that Plaintiffs' Petition stated separate and independent claims or causes of action and were thus all removable.
- E) The Judges of the Court of Appeals erred by applying the rules applicable to a Motion for Summary Judgment in ruling upon the Motion to Dismiss.
- F) The Judges of the Court of Appeals erred in determining that the District Court could judicially note that the numerical extent of employee assignments and transfers were necessary to comply with the purposed consent decree without the hearing of any evidence.
- G) The Judges of the Court of Appeals erred in determining that Plaintiffs' cause of action can be barred by laches prior to the expiration of the Statute of Limitation,

in the absence of any showing that Defendants were either damaged by or relied upon Plaintiffs' inactivity.

H) The Judges of the Court of Appeals erred in determining that an employer may use race as the sole criteria for assigning or transferring its employees in the absence of any acknowledgement or finding of prior racial discrimination by the employer.

I) The Judges of the Court of Appeals erred in determining that a Federal District Court may judicially approve a consent decree requiring the assignment and transfer of employees based solely on their race in the absence of a judicial determination or admission that the assignment and transfer are required to overcome prior discriminatory conduct on the part of the employer.

A

The Judges of the Court of Appeals, Which Ruled Upon This Cause, Improperly Failed to Recuse Themselves in Violation of 28 U.S.C. 455.

The Supreme Court of the United States has not previously considered the criteria to be used by Federal Appellate Judges in considering the appropriateness of their recusal. There are, in fact, but a few decisions by the various Courts of Appeal as to the criteria to be used by District Court judges in their recusal based on bias or prejudice. Because of the growing number of instances in which District Court judges and judges of the Courts of Appeal are being challenged on the basis of possible bias, prejudice, or the appearance of impropriety, it becomes essential for this Court to set out a dispositive statement as to the guidelines and circumstances under which federal judges must recuse themselves.

The current statute on recusal of federal judges is contained in 28 U.S.C. 455. The most recent amendment to that provision

was contained in P.L. 93-512, Act of December 5, 1974. Only four circuits to date have discussed the provisions and language of that statute. The congressional intent of Public Law 93-512 can be found in the language of House Report 93-1453, 3 U.S. Cong. and Adm. News, 1974, page 6351. The House Judiciary Committee stated that:

"The purpose of the amended bill is to amend Section 455 of Title 28 United States Code, by making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to the disqualification of judges for bias, prejudice, or conflict of interest." Ibid. page 6351.

The Judiciary Committee pointed out that prior to 1974,

"The existence of dual standards, statutory and ethical, couched in uncertain language, has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hindsight. The effect of the existing situation, if not only to place the judge on the horns of a dilemma, but in some circumstances, to weaken public confidence in the judicial system." Ibid., page 6352.

After then discussing the history of the creation of the Code of Judicial Conduct promulgated by the American Bar Association in August of 1972, the House Judiciary Committee also pointed out that the administrative office of the United States Courts has:

"Made applicable to all Federal Judges the new code of judicial conduct, including Canon 3(C) relating to disqualification of judges." Ibid., page 6353.

The House Judiciary Committee pointed out specifically that,

"Subsection (a) of the amended Section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceedings in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute through the use of the phrase 'in his opinion.' This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable, factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. See *Edwards v. United States* (5th Cir. 1964), 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.' Such a concept has been criticized by legal writers and witnesses at the hearing were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system." *Ibid.*, pages 6354-6355.

In addressing the question as to the extent of personal knowledge required of a judge before he ought to recuse himself, the House Judiciary Committee pointed out that one of the few exceptions to the general rule that personal knowledge of disputed evidentiary facts would disqualify the judge is the question of a judge dealing with summary contempt in open court before them. The committee observed that,

"The summary contempt procedure has been and remains an indispensable exception to the usual procedures and the bill would not affect it." *Ibid.*, page 6355.

There could be no question but that the provisions of 28 U.S.C. 455 deal with appellate judges in view of the language of the Judiciary Committee.

"Under subsection (a), coverage of the amended statute is made applicable to magistrates and referees in bankruptcy, as well as Supreme Court justices and all other federal judges." (3 U.S. Cong. & Adm. News, 1974, at page 6356.)

The few Courts of Appeals decisions on the point would support Plaintiffs' position. The First Circuit held in *U. S. v. Cowden*, 545 F.2d 257 (1 C.A., 1977), that a judge need not recuse himself based on the fact that he presided over the two prior trials of four co-defendants. The First Circuit did provide some helpful dictum when it pointed out that:

"The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even in the mind of the litigant filing the motion under 28 U.S.C. 455, but rather in the mind of the reasonable man." *U. S. v. Cowden*, 545 Fed.2d at 265.

The First Circuit held that the mere fact that the judge presided at two prior trials involving the same general criminal activity would not create such a reasonable doubt in the mind of the reasonable man.

The only decision from the Fourth Circuit is not germane to this action. In *In Re: Virginia Electric and Power Company*, 539 F.2d 357 (4 C.A., 1976), the judges discussed the extent of the possible pecuniary interest which might befall a sitting judge if he presided at a trial. In the *Virginia Electric and Power Company* case, the Plaintiffs were suing the Defendant contractor for damages. If the Plaintiff was successful,

it was possible that the customers of Virginia Electric and Power Company, including the District Court Judge who would preside at the trial, might receive a reduction in their electric utility bills ranging from between \$70.00 and \$100.00, and that refund might be spread out over a 40 year period. The Court, in ruling that the District Court judge should not have disqualified himself, held that the 1974 amendment to 28 U.S.C. 455 was not applicable since the case was filed before the 1974 amendment, that the order disqualifying all judges in Virginia was overly broad, and that the possibility of the \$70.00 to \$100.00 refund was so minimal as to constitute de minimis.

The Fifth Circuit, on two occasions, has discussed the provisions of 28 U.S.C. 455. In *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5 C.A., 1975), the Fifth Circuit pointed out that:

"Section 455 is the statutory standard for disqualification of a judge. It is self-enforcing on the part of the judge. It may also be asserted by a party . . . through assignment of error on appeal, *U. S. v. Seiffert*, 5th Cir., 1974, 501 F.2d 974; *Shadid v. Oklahoma City*, 10 Cir. 1974, 494 F.2d 1267, 1268 . . ." *Davis v. Board of School Commissioners*, 517 F.2d at 1051.

The Fifth Circuit then went on to point out that:

"We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. The determination should also be made on the basis of conduct extra judicial in nature as distinguished from conduct within the judicial context." *Ibid.* at page 1052.

The Court also pointed out that:

"The new language was designed to substitute the reasonable, factual basis—reasonable man test in determining disqualification for the subjective 'in the opinion of the judge' test in use prior to the amendment. (Citing cases.) It was also intended to overrule the so-called duty to sit decision." *Ibid.* at page 1052.

In the other Fifth Circuit case, the personal bias of the judge was considerably more obvious. In *United States v. Brown*, 539 F.2d 467 (5 C.A., 1967), the trial judge was heard to have said, prior to the commencement of the original trial, that "he was going to get that nigger." After the defendant was convicted, the defendant's attorney filed a motion to recuse the judge from ruling upon the post-trial motions. The post-trial motions were then heard by another judge. One of these post-trial motions was directed at the personal bias of the trial judge. The substitute judge, who ruled upon the post-trial motions, found that the trial judge was indeed biased against the defendant, but held that the record disclosed that the defendant got a fair trial in any event. In reversing, the Fifth Circuit pointed out that:

"The truth pronounced by Justinian more than a thousand years ago that 'impartiality is the life of justice' is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and effect the measure of its judgment. If the judge finds himself possessed of those sentiments, he should recuse himself; or, if he does not, confront the likelihood of proceedings under the statute to require him to do so." *U. S. v. Brown*, 539 F.2d at 469.

The Court then went on to quote an earlier case when it held that:

"For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality."

"Like statements of the principal as to the 'appearance of justice' within the fair trial concept, are found in many other decisions and have now been codified in the new recusal statute, which requires mandatory disqualification of a judge 'in any proceedings in which his impartiality *might reasonably be questioned*' or 'where he has a personal bias or prejudice concerning a party.' To say more will unduly lengthen this decision." *Ibid.* at 469-470.

The only case coming out of the Seventh Circuit was one of similarly blatant circumstances. In *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110 (7 C.A. 1977), a Writ of Mandamus was issued ordering the trial judge to disqualify himself from proceeding in a case where the defendant was represented by a law firm, a partner in which was a brother to the presiding trial judge. The Seventh Circuit held that the judge's brother's financial interest in the litigation was sufficient to require the trial judge to disqualify himself.

In the case being presented to this Court, the plaintiff pointed out to the Court of Appeals that two of the three judges who were sitting to hear the appeal had formed an opinion as to disputed evidentiary facts, which opinion was publicly stated and published in their opinion of *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768 (8 C.A., 1976) cert. den'd. 433 U.S. 914, 1977. Specifically the judges were of the opinion that:

"The parties were faced with an admittedly de jure segregated school system whose district lines had been coterminous with those of the city since 1876." *Liddell v. Caldwell*, 546 F.2d at 772.

Similarly, Judges Lay and Bright pointed out that:

"As we stated earlier, we do not believe that the merits of the Consent Decree are before us, since we consider the decree interlocutory in nature. We do observe, however,

that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the claim will encounter serious constitutional objection." *Ibid.* at page 773.

Given the extent of Judges Lay and Bright's preconceptions and apparent extrajudicial knowledge of the proceedings, they ought to have recused themselves, having been challenged by the motion to disqualify. They did not, and this Court should therefore consider the appropriateness of accepting this case to discuss the parameters within which Federal judges ought to grant recusal motions.

B

The Judges of the Court of Appeals Erred in Determining That This Action Was Removable to the Federal District Courts From the Missouri State Circuit Court Under the Provisions of 28 U.S.C. 1331 and 28 U.S.C. 1441.

C

The Judges of the Eighth Circuit Court of Appeals Erred in Determining That the Amendment of the Petition for Removal, After the Time Within Which a Responsive Pleading Was Required, Was Permissible, and That Removal Was Proper Under the Terms of 28 U.S.C. 1343 and 28 U.S.C. 1443.

D

The Judges of the Eighth Circuit Court of Appeals Erred in Determining That Plaintiffs' Petition Stated Separate and Independent Claims or Causes of Action and Were Thus All Removable.

While your Petitioners have separately listed these three points for purposes of clarity, they are sufficiently interrelated to be discussed together.

Petitioner first suggests that the rather unusual procedure of allowing the Petition for Removal after the return date for the show cause order and after the filing of the Motion to Remand was improper. It must be pointed out that the District Court referred to 28 U.S.C. 1343(3) and (4) in denying the Motion to Remand. Yet 28 U.S.C. 1343 was not the basis for the Removal Petition. It is important to note that the District Court and Court of Appeals both relied on 28 U.S.C. 1343 to justify the removal. The question that this Court should answer is whether such unusual procedures are permissible.

But even if such unusual procedures are permissible, the question of "separable" and "separate" causes of action was also critical to the determination of the issues in this cause.

This Court last addressed the question as to the removability of cases from the state to the Federal Court in 1951 in *American Fire and Casualty Company v. Finn*, 341 U.S. 6, 95 L.Ed. 702 (1951). That decision spoke with unusual clarity and decisiveness concerning the 1948 amendment to the Federal procedural requirements on removal of cases. Since that time, several of the Circuits and many of the Districts have struggled with the meaning and the scope within which state causes can be removed to the Federal Courts. Legal scholars have written of the dangers of which District Courts need to be aware in granting Petitions for Removal, and have frequently cautioned against the ease with which removal actions have occurred. The removal statutes are set out in 28 U.S.C. 1441 and condition removal upon the existence of independent jurisdiction in the Federal Court over the original cause. If the Federal Courts would have had jurisdiction of the original cause, then the case could have been removed. There is an obvious caveat to that general rule, and that caution is set out in 28 U.S.C. 1441(c). This is the so-called separate and independent claim or cause of action provision. This Court quite succinctly stated the distinction of the criteria under the pre-1948 and post-1948 amendments. In discussing the difference, this Court stated:

"A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. (Cases cited.) Congress has authorized removal now under Section 1441 (c) only when there is a separate and independent claim or cause of action. Of course, a separate cause of action restricts removal more than a separable controversy . . . The addition of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceeding and those cognizable only in the state courts before allowing removal." *American Fire and Casualty Company v. Finn*, 341 U.S. at pages 11-12, 95 L.Ed. at page 707.

In describing what was meant by separate causes of action, this Court went on to say:

"Upon principal, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

"A cause of action does not consist of facts, but of an unlawful violation of a right which the facts show . . . considering the previous history of 'separable controversy' the broad meaning of 'cause of action' and the congressional purpose of the revision resulting in 28 U.S.C. Section 1441(c), we conclude that where there is a single wrong to plaintiff for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under Section 1441(c)." 341 U.S. at pages 13-14, 95 L.Ed. 708-709.

The distinction between separate and separable might best be illustrated by this Court's discussion in the *Hurn* case.

In discussing the case before the Court in *Hurn*, the Court stated:

"The primary relief sought is an injunction to put an end to an essentially simple wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for an independent cause of action. The applicable rule is stated, and authorities cited in *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 71 L.Ed. 1069, 47 S.Ct. 600. 'A cause of action does not consist of facts, this Court there said (page 321) but of the unlawful violation of a right which the facts show. The number and the variety of facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is a violation of but one right by a single legal wrong . . . The facts are merely the means and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.' Thus tested, the claims of infringement and of unfair competition averred in the present bill of complaint are not separate causes of action, but different grounds asserted in support of the same cause of action." 289 U.S. at pages 246-247, 77 L.Ed. 1154.

The intent of 28 U.S.C. 1441(c) was to limit the removal of cases. 14 Wright, Miller & Cooper, Federal Practice and Procedure, Section 3721, page 533. All doubts are to be resolved against removal. 14 Wright, Miller & Cooper, *ibid.*, at pages 535-536. The party seeking the removal has the burden of establishing that removal is proper. 14 Wright, Miller & Cooper, *ibid.*, at page 530. See also 32 AmJur 2d, Federal Practice and Procedure, Section 456.

The Eighth Circuit Court of Appeals affirmed the judgment of the district court, which relied upon *Gully v. First National*

Bank in Meridian, 299 U.S. 109, 81 L.Ed. 70 (1936). In addition to the *Gully* case having been pre-1948, and thus not applicable, the language of that case has consistently been urged to be read with a great deal of caution.

"Unfortunately, although there is much that is valuable in *Gully*, there is also much that is questionable or misleading." 13 Wright, Miller & Cooper, Federal Practice and Procedure, Section 3562, page 405.

Even Professor Moore, in his treatise observed:

"But where the plaintiff joins two or more defendants to recover damages for one injury, even though he charges them with joint and severable liability, or only severable liability, or charges them with liability in the alternative, there is no joinder of separate and independent causes of action within the meaning of Section 1441(c). At most a separable controversy is presented where several or alternative liability is alleged, and is no longer the basis for removal." 1A Moore's Federal Practice, ¶0.163(2), page 247.

This language was specifically cited with approval in *American Fire and Casualty Company v. Finn*, 341 U.S. 6, 14, 95 L.Ed. 702, 709 (1951).

Yet the Eighth Circuit in its per curiam opinion affirms the decision of the district court, which district court opinion concluded that:

"If the adjudication of a claim depends upon the application of either the constitution or the laws of the United States, the entire case is removable." (Citing *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936).)

The several Federal Courts which have discussed the criteria for removal have noted the increasing presumption against removability.

"Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts in removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of the legislation." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109, 85 L.Ed. 1214 (1941).

In the even earlier case of *Hurn v. Oursler*, 289 U.S. 238, 77 L.Ed. 1148 (1933), in discussing the pre-1948 Rule, Mr. Justice Southerland stated:

"But the rule does not go so far as to permit a Federal Court to assume jurisdiction of a separate and distinct non-Federal cause of action because it is joined in the same complaint with a Federal cause of action. The distinction to be observed is between a case where *two distinct grounds in support of a single cause of action* are alleged, one only of which presents a Federal question and the case where two separate and distinct causes of action are alleged, one only of which is Federal in character. In the former, where the Federal question averred is not plainly wanting in substance, the Federal Court, even though the Federal ground is not established, may nevertheless retain and dispose of the case upon the non-Federal grounds; in the latter it may not do so upon the non-Federal cause of action." 289 U.S. at pages 245-246, 77 L.Ed. at page 1154.

Prior to 1866 no case could be removed to the Federal courts unless diversity was present. In 1866 Congress authorized the removal of those portions of State court questions over which the Federal courts had jurisdiction, leaving the remainder in State court. Act of July 27, 1866, 14 Stat. 306. In 1878 Congress again amended the statute allowing the removal of the entire cause. Act of March 3, 1875, 18 Stat. Pt. 3, 470.

The statute remained unchanged until 1948 and engendered a great deal of confusion. Finally in 1948 the statute was again amended to avoid the confusion. The 1948 amendment is the current 28 U.S.C. 1441(c). "The Revised Statute not only introduces a new standard for removability, but also differs from its predecessors in that it applies to both diversity and Federal question cases, rather than embracing only separate and independent controversies between citizens of different states." 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, Section 3724, page 622.

It would appear, therefore, that the Eighth Circuit and the Federal District Court for the Eastern District of Missouri are renouncing the 1948 amendments to 28 U.S.C. 1441 and are re-establishing the pre-1948 rule and the language of *Gully v. First National Bank in Meridian*.

It is, therefore, appropriate for this court to grant this Petition for Writ of Certiorari so that it may reverse and remand the Circuit Court of Appeals' decision and reaffirm this Court's decision in *American Fire and Casualty Company v. Finn*, 341 U.S. 6, 95 L.Ed. 702 (1951), or reconsider the propriety of the language of the 1951 decision.

E

The Judges of the Court of Appeals Erred by Applying the Rules Applicable to a Motion for Summary Judgment in Ruling Upon the Motion to Dismiss.

The Defendants in the original cause filed a document which they designated "Motion of Defendants, the Board of Education of the City of St. Louis, et al., to Dismiss This Action for Failure to State a Claim upon Which Relief May Be Granted and Suggestions in Support." The District Court, in its memorandum opinion, referred to its decision as a ruling "on the

Motion of Defendants to Dismiss for Failure to State a Claim." The Court ruled that, "It is further ordered that the Defendants' Motion to Dismiss be and is granted." Throughout the memorandum opinion of the District Court, the trial judge referred to the Motion to Dismiss. It is appropriate for this Court to again re-examine the scope of examination in considering a motion to dismiss. The question was presented on appeal to the Eighth Circuit. Yet clearly the District Court, with the approval of the Circuit Court of Appeals, went far beyond the face of the pleadings in determining whether the Plaintiffs had stated a cause of action. This court, as recently as 1974, has placed clear restrictions on the scope of the examination by federal courts in reviewing the sufficiency of a complaint.

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . . its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well established that in passing on a motion to dismiss, whether on the grounds of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L.Ed.2d 90, 96 (1974).

In considering motions to dismiss, the court's inquiry is restricted exclusively to the contents of the complaint and may not consider any possible defenses. 5 Wright & Miller, Federal Practice and Procedure, Section 1357, pages 592, 594, 605-606.

The gratuitous affidavit attached to Defendants' Motion to Dismiss did nothing more but to confess that the original Plain-

tiffs were in fact employees of the Defendant, Board of Education, that six of the Plaintiffs were teachers, three were non-teacher employees, five of the nine Plaintiffs were members of collective bargaining organizations, two of the nine Plaintiffs were black, and seven were white.

None of these allegations attack the sufficiency of Plaintiffs' original Petition, and in fact, Plaintiffs admitted that they were both certificated and non-certificated employees. The fact that some were members of collective bargaining organizations was immaterial to the allegations in the Petition, and yet the district court, affirmed by the Court of Appeals, held that this was a significant item.

The Defendants requested the District Court to take judicial cognizance of the existence of a Consent Decree in a separate case then pending before the Court, to-wit: *Liddell, et al. v. Board of Education of the City of St. Louis, et al.*, bearing Federal District Court Cause Number 72-C-100(1). The Defendants claimed that they had a defense to Plaintiffs' Petition in that they were merely complying with a purported Consent Decree entered on December 24, 1975. If such was the honest allegation of Defendants, then it might have constituted a defense. Yet, in a Motion to Dismiss, defenses cannot be considered. 5 Wright & Miller, Federal Practice and Procedure, Section 1356, page 592. It is only under circumstances when:

"The complaint . . . is subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense, but the defense must clearly appear on the face of the pleadings." 5 Wright & Miller, Federal Practice and Procedure, Section 1357, pages 605-606.

There can be no question but that the District Court, affirmed by the Court of Appeals, treated the motion pending before it as a Motion to Dismiss.

"It is further ordered that Defendants' Motion to Dismiss be and is granted. Plaintiff's complaint is hereby dismissed with prejudice." Page 4 of District Court memorandum opinion; appendix page A-46.

"The Court will next address the Defendants' Motion to Dismiss for Failure to State a Claim under Rule 12(b) (6) F.R.C.P." Appendix page A-50.

Concededly, the District Court could have, under certain circumstances, treated the Motion to Dismiss as a Motion for Summary Judgment under the provisions of Rule 56 F.R.C.P. as the Eighth Circuit said in *Evans v. McDonnell Douglas Aircraft Corporation*, 395 F.2d 359 (8 C.A., 1968). The Eighth Circuit Court of Appeals held that under certain circumstances, a district court may treat a motion to dismiss under Rule 12 (b)(6) as a motion for summary judgment under Rule 56. The District Court did not purport to treat the Motion to Dismiss as a motion for summary judgment, and thus, obviously went beyond its authority and power.

However, even if the Court had treated the Motion to Dismiss as a motion for summary judgment, then it still erroneously applied the improper criteria.

"Considering the motion therefor as one for summary judgment, the crucial question is whether this case presents a genuine issue as to some material fact. Unless the pleadings and supporting documents disclose beyond any doubt the absence of a genuine issue of fact, summary judgment should not be entered. *Evans v. McDonnell Douglas Aircraft Corporation*, supra, at page 362.

Yet the District Court, whose decision was affirmed per curiam by the Court of Appeals, stated:

"There is, therefore, virtually no probability of success on the merits of an equal protection claim where the Board

has such authority to transfer teachers." (District Court's Opinion, Appendix page A-50)

Thus the District Court applied the improper criteria and dismissed the cause of action for failure to state a claim because in its opinion there was virtually no probability of success on the merits.

In addition to taking judicial cognizance of the Consent Decree in Case Number 72-C-100(1), the District Court also presumed, assumed, and somehow or other magically took judicial cognizance that each of the transfers of which Plaintiffs complain were somehow or other required by the Consent Decree. The Plaintiffs' Petition alleged that the Defendant intended to transfer, assign, or reassign approximately 648 employees based exclusively on their race. The District Court magically concluded that all 648 employee transfers were required to "affirmatively act to reduce the racial imbalance of teachers in the St. Louis City School System." Appendix page A-50.

It is wanton injustice for this Court to allow such wholesale presumptions to go unfettered. Even if the Defendants honestly believed they had a legitimate defense to Plaintiffs' Petition under the terms of the Consent Decree, they were required to plead that defense initially. At some point it was incumbent upon them to prove that 648 employee transfers were required to meet the terms of the consent decree. They chose not to, and the District Court and the Eighth Circuit Court of Appeals allowed themselves to be accomplices to this blatant and baseless assignment and transfer policy.

F

The Judges of the Court of Appeals Erred in Determining That the District Court Could Judicially Note That the Numerical Extent of Employee Assignments and Transfers Were Necessary to Comply With the Purported Consent Decree Without the Hearing of Any Evidence.

As was mentioned above, the Court of Appeals, in its per curiam opinion, affirmed the District Court opinion for the reasons stated in the District Court opinion. The basis for the District Court's opinion was that:

"Paragraph five of that consent order, which was approved by this Court, requires the Defendants to affirmatively act to reduce the racial imbalance of teachers in the St. Louis School System.

"The Court is of the opinion that the teachers can state no claim, federal or otherwise, for the transfers ordered under the Consent Decree in *Liddell*, supra." Appendix page A-50.

Quite obviously the District Court, without any supporting documents or evidence, and without even an affirmative defense having been pleaded, concluded that the 648 transfers were somehow or other magically required by the Consent Decree. Such gross presumption is so foreign to any basis in fact, that this Court ought not allow it to stand unchallenged.

G

The Judges of the Court of Appeals Erred in Determining That Plaintiffs' Cause of Action Can Be Barred by Laches Prior to the Expiration of the Statute of Limitation, in the Absence of Any Showing That Defendant Were Either Damaged by or Relied Upon Plaintiffs' Inactivity.

The District Court and the Court of Appeals pointed out that the Plaintiffs were given an opportunity to intervene in *Liddell*,

but chose not to do so. The court then used this observation to support its "determination that Plaintiffs can state no claim."

Whether this philosophy be described as laches or estoppel, the Court improperly considered the doctrine. Both laches and estoppel are affirmative defenses which need to be affirmatively pled and may not be considered on motions to dismiss.

"Rule 8(C) of the Rules of Civil Procedure requires that . . . estoppel and any other matter constituting an avoidance or affirmative defense must be set forth affirmatively. If this is to be an issue, Defendant must answer the complaint before it can be heard on it." *Cohen v. United States*, 129 F.2d 733, 737 (8 C.A., 1942).

The mere lapse of time without anything rendering it inequitable to grant relief does not constitute laches. *Spiller v. St. Louis and San Francisco Railway Company*, 14 F.2d 284 (8 C.A., 1926); *Nave-McCord Mercantile Company v. Raney*, 29 F.2d 383 (8 C.A., 1926). Mere delay in filing suit does not constitute laches, since it must be shown that the party pleading laches was in some way prejudiced by the delay. Similarly for employment discrimination, the statute of limitations in Missouri is five years. 516.120 R.S.Mo. (1969); *Green v. McDonnell Douglas Corporation*, 463 F.2d 337 (8 C.A., 1972). Yet the District Court, affirmed by the Court of Appeals held that the fact that the Plaintiffs, who filed their cause of action within less than one year of the applicable statute of limitations, had somehow become estopped, and that this somehow magically supported the determination that the Plaintiffs can state no claim.

It is appropriate for this Court to grant certiorari to rule on this issue and to instruct the Federal Court as to the distinction of the use of both estoppel, laches, and its concomitant relationship to the Statute of Limitations.

H

The Judges of the Court of Appeals Erred in Determining That an Employer May Use Race as the Sole Criteria for Assigning or Transferring Its Employees in the Absence of Any Acknowledgment or Finding of Prior Racial Discrimination by the Employer.

In recent terms of court, this Court has ruled in *Regents of the University of California v. Bakke*, — U.S. —, 57 L.Ed.2d 756, 1978, that in the absence of prior unlawful employment discrimination, explicit racial classifications have never before been countenanced by the Court.

"The employment discrimination cases also do not advance Petitioner's cause. For example in *Franks v. Bowman Transportation Company*, 424 U.S. 747, 1975, we approved a retroactive award of seniority to a class of negro bus drivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary to make (the victims) whole for injuries suffered on account of unlawful employment discrimination." *Regents of The University of California v. Bakke*, 57 L.Ed.2d at 778 (1978).

"But we have never approved preferential classification in the absence of proven constitutional or statutory violations." *Ibid.* at 778-779.

"Without such finding of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." *Ibid.* at 782-783.

The majority of the judges agreed that:

"It is evident that the Davis Special Admissions Program involves the use of an explicit racial classification never before countenanced by this Court." *Regents of the University of California*, *ibid.* at page 789.

The Court of Appeals did not find, and the District Court in its opinion does not suggest, that there has been a finding of de jure segregation in the St. Louis Public Schools necessary to assign its employees on a racially discriminatory basis. The Court of Appeals, in considering the Consent Decree in 1976 held that:

"The parties were faced with an admittedly de jure segregated school system whose district lines have been co-terminous with those of the City since 1876." *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, 772 (8 C.A., 1976).

However, the Court of Appeals also took it upon itself to comment that the Consent Decree "will encounter serious constitutional objection." *Liddell, et al. v. Caldwell, et al.*, *ibid.* at page 773. It is important to note that the conclusion of the Court of Appeals was totally in error in concluding that the school system in St. Louis was "an admittedly de jure school system." The evidence of that erroneous conclusion is that the trial of that issue concluded in the Eastern District of Missouri with final arguments on February 2, 1979 with no final decision.

Therefore, there is at least a serious question as to whether or not the Consent Decree constitutes a final judgment, and in the absence of a finding of prior racial discrimination, Petitioners urge that this Court rule that race may not be used as the sole criteria for assigning or transferring employees.

I

**The Judges of the Court of Appeals Erred in Determining
That a Federal District Court May Judicially Approve a Con-
sent Decree Requiring the Assignment and Transfer of Em-
ployees Based Solely on Their Race in the Absence of a Judicial
Determination or Admission That the Assignment and Transfer
Are Required to Overcome Prior Discriminatory Conduct on
the Part of the Employer.**

The corollary question to whether race may be used as the sole criteria for assigning employees in the absence of a finding of racial discrimination is the power of a Federal Court to approve a consent decree requiring an assignment or transfer of employees using race as the sole criteria in the absence of such a judicial finding. It is appropriate, at this stage of this Court's review of the cases, that the Court definitively state that in the absence of a judicial finding of prior discriminatory conduct, the Federal Courts have no jurisdiction, and may not approve or in any way be parties to an agreement between litigating parties to discriminate or classify its employees on a racial basis.

CONCLUSION

For all of these reasons, it is respectfully urged upon this Court that the Writ of Certiorari be granted and that the Court take jurisdiction to hear the appeal.

Respectfully submitted,

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241-8600
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APPENDIX

APPENDIX 1

State of Missouri }
City of St. Louis } ss.

In the Circuit Court of the City of St. Louis

State of Missouri

Cause No. 782-4280

Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel,
Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader,
and Virginia Norris,

Plaintiffs,

vs.

The Board of Education of the City of St. Louis, a Public
Corporation, Serve: Mr. Robert E. Wentz, Superintendent of
Schools, 911 Locust Street, St. Louis, Missouri,
and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry
M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence
E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy
C. Springer, Marjorie M. Weir, and Donald W. Williams,
Constituting and Being Members of the Board of Education
of the City of St. Louis, Serve at: 911 Locust Street, St.
Louis, Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street,
St. Louis, Missouri,
and

Burchard Neel, Jr., Associate Superintendent of Schools, 911
Locust Street, St. Louis, Missouri,
Defendants.

PETITION

Come now Plaintiffs and for their causes of action state as
follows:

Count I

1. Defendant, the Board of Education of the City of St. Louis, hereinafter referred to as "the Board," is a public corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and whose chief administrative officer is Robert E. Wentz, Superintendent of Schools.

2. Defendants, Benson, Bond, Busse, Grich, Klinefelter, Moser, Nicholson, Schlaflly, Smith, Springer, Weir, and Williams, hereinafter referred to as "Board members," are members of and constitute the Board of Education of the City of St. Louis.

3. Defendant, Wentz, is the Superintendent of Schools, charged with the responsibility of the general administration and supervision of school activities within the City of St. Louis.

4. Defendant, Neel is an Associate Superintendent of Schools and is charged with the responsibility and general administration and supervision of personnel matters for the Board.

5. Plaintiffs are, and at all material times herein mentioned were, employees of the Board.

6. That jurisdiction of this cause is vested in this Court by reason of 527.010 through 527.130 R.S.Mo. (1969).

7. That the Board has classified all of its employees into two categories: certificated and noncertificated employees, in accord with Chapter 168 of the Revised Statutes of Missouri.

8. That the certificated employees are those employees in a general teaching capacity and possessing a certificate issued by the State of Missouri authorizing and empowering said employee to teach in public school systems within the State of Missouri.

9. That all other employees of the Board are noncertificated employees.

10. That employees, having obtained tenured status under the laws of the State of Missouri, may not be discharged, disciplined, or have their jobs and employment rights in any other way altered, except in accord with Board policy and in accord with Chapter 168 of the Revised Statutes of Missouri.

11. That the Board has established procedures wherein the rights of its employees are protected in the areas of assignment and transfer.

12. That amongst the criteria established by the Board in determining employee rights and the assignment or transfer of employees to other job locations are:

a) Tenured employees have the right to remain in their present position in preference to probationary employees.

b) Among employees of equal rank and system seniority, the employees with the greatest building seniority have the right to remain in their present position.

c) In making assignments and transfers of certified employees, consideration is to be given to grade level, subject matter area, position for which the teacher is best suited by qualification and experience, available existing vacancies, school and locality preference, residence of the employee, and transportation facilities.

13. That Section 296.020 R.S. Mo. (1969) provides in pertinent part:

"296.020. Unlawful employment practices defined.

"It shall be an unlawful employment practice:

"(1) For an employer, because of the race, creed, color, religion, national origin, sex, or ancestry of any individual:

"(a) To fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, creed, color, religion, national origin, sex, or ancestry; or

"(b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, creed, color, religion, national origin, sex, or ancestry;"

* * * * *

"(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, creed, color, religion, national origin, sex or ancestry, unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of his race, creed, color, religion, national origin, sex or ancestry, or to classify or refer for employment any individual on the basis of his race, creed, color, religion, national origin, sex or ancestry."

* * * * *

"(5) For any person, whether an employer or an employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."

14. That Section One of the 14th Amendment of the United States Constitution provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15. That 42 U. S. C. Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

16. That 42 U. S. C. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

17. That 42 U. S. C. Section 2000e-2 provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

18. That Ordinance Number 51512 of the City of St. Louis, approved November 29, 1962 provides, in applicable part:

"SECTION TWO: It shall be an unlawful employment practice:

"(a) For an employer, because of race, creed, color, religion, national origin or ancestry of any individual to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * * * *

"(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly any limitation, specification, or discrimination because of race, creed, color, religion, national origin, or ancestry, unless based upon a bona fide occupational qualification."

19. That Ordinance Number 57173 of the City of St. Louis, approved April 2, 1976, provides in applicable part:

"Section Nine—Discriminatory practices—Discriminatory practices, as hereinafter defined and established, are hereby prohibited and declared unlawful:

"a) DISCRIMINATION IN EMPLOYMENT—
It shall be unlawful employment practice:

"1) For an employer to fail or refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to compensation or the terms, conditions, or privileges of employment, because of race, creed, color, age, religion, sex, national origin or ancestry.

* * * * *

"4) For an employer, labor organization, or employment agency to print or circulate or cause to be printed or circulated any placement advertisement or publication or to make any inquiry in connection with prospective employment which expresses directly or indirectly any preference, limitation, specification, or discrimination because of race, creed, color, age, religion, sex, national origin, or ancestry, unless based upon a bona fide occupational qualification."

20. That the Board, Board members, Defendant, Wentz, and Defendant, Neel, are currently engaged in acts in violation of the aforesaid policy and procedures, Constitutional Amendment, Federal and State Statutes, and City Ordinances, in the following respects:

a) That they are assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.

- b) That they are assigning, reassigning, and transferring employees without regard to grade level, subject matter area, position for which the employee is best suited by qualification and experience, available existing vacancies, school and locality preferences, residence of the employee, and transportation facilities.
 - c) That they are discriminating against employees with respect to terms, conditions, or privileges of employment because of the employee's race, color, ancestry, and national origin in assigning, reassigning, and transferring employees.
 - d) That they are limiting, segregating, and classifying employees in a way which adversely deprives and tends to deprive employees of employment opportunities and adversely affects employee status by assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.
 - e) That they are maintaining, using, printing, and circulating statements, advertisements, and publications which express limitations, specifications, and discrimination based on race, color, ancestry, and national origin in that black and white employees are being assigned, reassigned, and transferred to locations from separate lists based exclusively on the race, color, ancestry, and national origin of the employees.
 - f) That the defendants have predetermined which of its employees will be assigned, reassigned, and transferred based on the race, color, ancestry, and national origin of the employees and has and is inciting, compelling, and coercing employees to accept the discriminatory assignments, reassignments, and transfers.
21. That Plaintiffs have received a notification that they will be transferred, reassigned, or assigned based exclusively on their race.

- 22. That the Board currently intends to transfer, assign, or reassign approximately 648 employees prior to the opening of the 1978-79 school year, based exclusively on their race.
 - 23. That Plaintiffs believe on their best information that the Board, Board members, Defendant, Wentz, and Defendant, Neel, have authorized, instructed, or caused several hundred other employees to be assigned, transferred, or reassigned, based exclusively on their race.
 - 24. That Plaintiffs bring this suit on behalf of themselves and all employees of the Board; that the Board has in excess of seven thousand (7,000) employees; and that those persons who are affected by this decision are too numerous to be named individually, and that the Plaintiffs herein fairly and adequately represent the class of employees of the Board.
- WHEREFORE, Plaintiffs pray an order of this Court:
- (A) Designating them as representatives of the class of employees of the Board affected by Board policies and actions as above described;
 - (B) Adjudging that the actions, policies, and practices of the Board, Board members, and Defendants, Wentz and Neel, of assigning, transferring, or reassigning employees based on their race, are illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis;
 - (C) Awarding them attorney's fees and the reimbursement of all costs expended in this cause; and
 - (D) For such other orders as to this Honorable Court shall seem meet and just.

Count II

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I.
2. That unless restrained or enjoined by this Court, Defendants, Board, Board members, Wentz, and Neel, will continue to unlawfully and illegally discriminate against employees and will order and carry out their discriminatory practices of assignment, reassignment, and transfers.
3. That the Plaintiffs and the class which Plaintiffs represent have no adequate remedy at law.

WHEREFORE, Plaintiffs pray an order of this Court;

- (A) Ordering and directing the Defendants, Board, Board members, Wentz, and Neel, to show cause why they should not be restrained from assigning, transferring, or reassigning employees based on their race;
- (B) For a preliminary injunction;
- (C) Upon a full hearing on the merits, for a permanent injunction prohibiting, restraining, and enjoining Defendants, and each of them, from assigning, reassigning, or transferring, or attempting to assign, reassign, or transfer employees based on their race;
- (D) That the Court further award the Plaintiffs' attorney's fees and all costs expended in this cause; and
- (E) For such other relief as to this Court might seem meet and just.

Count III

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I and Paragraphs 1 through 3 of Count II.
2. That the Defendants, Board, Board members, Wentz, and Neel, have, by their actions and attempted actions, damaged the Plaintiffs and all members of the class which they represent and against whom the Defendants have already discriminated by assigning, reassigning, or transferring, in the amount of Ten Million and No/100 Dollars (\$10,000,000.00).

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the class which they represent, pray judgment against the Defendants, and each of them:

- (A) In the amount of Ten Million and No/100 Dollars (\$10,000,000.00);
- (B) For attorney's fees;
- (C) For their costs expended in this cause; and
- (D) For such other relief as might be just.

/s/ CHARLES R. MURPHY
CHARLES R. MURPHY

/s/ REBA VISCUSO
REBA VISCUSO

/s/ ELLEN BORDERO
ELLEN BORDERO

/s/ ROSALIND STEEL
ROSALIND STEEL

/s/ BETTY TURLEY
BETTY TURLEY

/s/ VIRGIL KOLODGIE
VIRGIL KOLODGIE
/s/ FLORENCE CLARIDGE
FLORENCE CLARIDGE
/s/ MARVIN CRADER
MARVIN CRADER
/s/ VIRGINIA NORRIS
VIRGINIA NORRIS

Subscribed and sworn to before me this 9th day of June,
1978.

/s/ ANTHONY J. SESTRIC
ANTHONY J. SESTRIC
Notary Public

My Commission Expires: August 26, 1980

FORDYCE & MAYNE
/s/ By ANTHONY J. SESTRIC
ANTHONY J. SESTRIC
120 South Central, Suite 1100
St. Louis, Missouri 63105
(314) 863-6900
Attorneys for Plaintiffs

APPENDIX 2

City of St. Louis
State of Missouri }^{ss.}

In the Circuit Court of the City of St. Louis
State of Missouri
Cause No. 782-4280
Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel,
Bettey Turley, Virgil Kolodgie, Florence Claridge, Marvin
Crader, and Virginia Norris, Plaintiffs,

vs.

The Board of Education of The City of St. Louis, a Public
Corporation, Serve: Mr. Robert E. Wentz, Superintendent of
Schools, 911 Locust Street, St. Louis, Missouri,

and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry
M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E.
Nicholson, Daniel L. Schlaflly, Marjorie Smith, Dorothy C.
Springer, Marjorie M. Weir, and Donald W. Williams, con-
stituting and being members of the Board of Education of
the City of St. Louis, Serve at: 911 Locust Street, St. Louis,
Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street,
St. Louis, Missouri,

and

Burchard Neel, Jr., Associate Superintendent of Schools, 911
Locust Street, St. Louis, Missouri, Defendants.

ORDER TO SHOW CAUSE

On reading and filing the Petition in this cause and on Motion of Plaintiffs,

IT IS ORDERED that the above-named Defendants, Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, Donald W. Williams, Robert E. Wentz, and Burchard Neel, Jr., show cause before this Court on the 29th day of June, 1978 at 9:30 a.m. or as soon thereafter as counsel can be heard in Division 3 for the Circuit Court of the City of St. Louis, at the Courthouse in the City of St. Louis, State of Missouri, why a preliminary injunction should not issue during the pendency of said action, according to the prayer of such Petition; and

It appearing to the Court's satisfaction that a proper case is presented for the issuance of an order to show cause in the place and stead of the usual notice of motion, it is hereby ordered and directed that service of this order to show cause and of the papers on which the same has been granted on the Defendants on or before the 29th day of June, 1978 shall be held sufficient notice of motion herein and the application for a preliminary injunction herein.

IT IS FURTHER ORDERED that the Clerk of this Court be hereby directed to cause certified copies of this order to be made, and that a copy of the Petition and a copy of this order be served on the above-named Defendants.

.....
Presiding Judge—Division No. . .

Dated this 12th day of June, 1978.

APPENDIX 3

In the United States District Court
Eastern District of Missouri
Eastern Division

Cause No.

The Board of Education of the City of St. Louis,
and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, constituting and being members of the Board of Education of the City of St. Louis,

and

Robert E. Wentz, Superintendent of Schools,
and

Burchard Neel, Jr., Associate Superintendent of Schools,
Petitioners,
vs.

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel,
Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris,
Respondents.

PETITION FOR REMOVAL

(Filed June 23, 1978)

The Board of Education of the City of St. Louis and the other named petitioners herein (hereinafter referred to as petitioners) show as follows:

1. This is an action commenced against petitioners on June 12, 1978 in the Circuit Court of the City of St. Louis, State of Missouri, being Cause No. 782-4280 and styled Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel, Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin Crader, and Virginia Norris, Plaintiffs, vs. The Board of Education of the City of St. Louis, and Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence N. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald W. Williams, constituting and being members of the Board of Education of the City of St. Louis, and Robert E. Wentz, Superintendent of Schools and Burchard Neel, Jr., Associate Superintendent of Schools, Defendants, wherein plaintiffs (respondents here) pray for damages in the sum of \$10,000,000.00; for a permanent injunction, attorney's fees and costs. On the same day, an Order to Show Cause with a notice of hearing scheduled for June 29, 1978, was issued.

2. The matter in controversy in this action, exclusive of interest and costs, exceeds the sum of \$10,000.00 and this action is wholly of a civil nature.

3. The above described action is a civil action of which this Court has original jurisdiction under the provisions of Title 28,

United States Code, Section 1331, and is one which may be removed to this Court by these petitioners (defendants therein), pursuant to the provisions of Title 28, United States Code, Section 1441, in that according to plaintiffs' petition their action arises under the Fourteenth Amendment to the Constitution of the United States, Sec. 1, and 42 USC 1981, 1983 and 2000e-2. Plaintiff's action amounts to an attack against the Consent Judgment and Decree entered by this Court on December 24, 1975 in cause No. 72C 100(1) styled *Liddell, et al. v. Board of Education of the City of St. Louis, et al.*

4. The summons issued out of the Circuit Court of the City of St. Louis was served upon these petitioners on the 20th day of June, 1978.

None of your petitioners has appeared in the Circuit Court of the City of St. Louis and the time within which your petitioners are required by law in the State of Missouri to plead or answer in this cause has not yet expired. Attached hereto and marked Exhibit 1 is a copy of the Summons issued by the Circuit Court of the City of St. Louis, State of Missouri, which was served together with a copy of plaintiffs' original petition, which is attached hereto as Exhibit 2, and the Show Cause Order which is attached hereto as Exhibit 3. No further proceedings have been had therein.

5. Petitioners file herewith a bond with good and sufficient surety, conditioned, as provided in Title 28 U.S.C., Section 1446(d), that the petitioners will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought, should it be determined that the cause was not removable or was improperly removed.

WHEREFORE, your petitioners pray that this Court accept

this petition and the bond presented herewith and that it assume jurisdiction of this action.

LASHLY, CARUTHERS, THIES, RAVA &
HAMEL, A Professional Corporation
/s/ JOHN H. LASHLY
PAUL B. RAVA
Attorneys for Petitioners
818 Olive Street, Suite 1300
St. Louis, Missouri 63101
621-2939

State of Missouri }
City of St. Louis } ss.

Paul B. Rava, being duly sworn on his oath, says that he is one of the attorneys for petitioners herein; that he is authorized to and does make this affidavit on behalf of said petitioners and that he has read the above and foregoing petition and that the facts stated therein are true and correct to the best of his knowledge, information and belief.

/s/ PAUL B. RAVA

Subscribed and sworn to before me this 22nd day of June, 1978.

/s/ MARY C. HUSSMAN
Notary Public

My Commission Expires: 6/30/80

EXHIBIT 1

Circuit Court of the City of St. Louis
State of Missouri
Charles Murphy et al., Plaintiff,
vs. { No. 782-4280
The Board of Education of the City of St. Louis, et al., Defendant. } Div. 3

Summons

The State of Missouri to Defendant The Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, and Donald Williams and Robert E. Wentz and Buchard Neel, Jr.

You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon Fordyce & Mayne, attorney for plaintiff, whose address is 120 S. Central, Clayton, Missouri 63105, all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.

Dated June 15th, 1978

JOSEPH P. RODDY
Circuit Clerk
By (Illegible)
Deputy Clerk

[Seal of Circuit Court]

EXHIBIT 2

State of Missouri }
City of St. Louis }^{ss.}

In the Circuit Court of the City of St. Louis
State of Missouri

Cause No. 782-4280

Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel,
Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin
Crader, and Virginia Norris, Plaintiffs,

vs.

The Board of Education of The City of St. Louis, a Public
Corporation, Serve: Mr. Robert E. Wentz, Superintendent of
Schools, 911 Locust Street, St. Louis, Missouri,

and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry
M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E.
Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C.
Springer, Marjorie M. Weir, and Donald W. Williams, con-
stituting and being members of the Board of Education of
the City of St. Louis, Serve at: 911 Locust Street, St. Louis,
Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street,
St. Louis, Missouri,

and

Burchard Neel, Jr., Associate Superintendent of Schools, 911
Locust Street, St. Louis, Missouri, Defendants.

PETITION

Come now Plaintiffs and for their causes of action state as
follows:

Count I

1. Defendant, the Board of Education of the City of St. Louis,
hereinafter referred to as "the Board," is a public corporation,
duly organized and existing under and by virtue of the laws of
the State of Missouri, and whose chief administrative officer
is Robert E. Wentz, Superintendent of Schools.

2. Defendants, Benson, Bond, Busse, Grich, Klinefelter,
Moser, Nicholson, Schlafly, Smith, Springer, Weir, and Williams,
hereinafter referred to as "Board members," are members of
and constitute the Board of Education of the City of St. Louis.

3. Defendant, Wentz, is the Superintendent of Schools,
charged with the responsibility of the general administration
and supervision of school activities within the City of St. Louis.

4. Defendant, Neal, is an Associate Superintendent of Schools
and is charged with the responsibility and general administration
and supervision of personnel matters for the Board.

5. Plaintiffs are, and at all material times herein mentioned
were, employees of the Board.

6. That jurisdiction of this cause is vested in this Court by
reason of 527.010 through 527.130 R.S.Mo. (1969).

7. That the Board has classified all of its employees into
two categories: certificated and noncertificated employees, in
accord with Chapter 168 of the Revised Statutes of Missouri.

8. That the certificated employees are those employees in a general teaching capacity and possessing a certificate issued by the State of Missouri authorizing and empowering said employee to teach in public school systems within the State of Missouri.

9. That all other employees of the Board are noncertificated employees.

10. That employees, having obtained tenured status under the laws of the State of Missouri, may not be discharged, disciplined, or have their jobs and employment rights in any other way altered, except in accord with Board policy and in accord with Chapter 168 of the Revised Statutes of Missouri.

11. That the Board has established procedures wherein the rights of its employees are protected in the areas of assignment and transfer.

12. That amongst the criteria established by the Board in determining employee rights and the assignment or transfer of employees to other job locations are:

a) Tenured employees have the right to remain in their present position in preference to probationary employees.

b) Among employees of equal rank and system seniority, the employees with the greatest building seniority have the right to remain in their present position.

c) In making assignments and transfers of certified employees, consideration is to be given to grade level, subject matter area, position for which the teacher is best suited by qualification and experience, available existing vacancies, school and locality preference, residence of the employee, and transportation facilities.

13. That Section 296.020 R.S.Mo. (1969) provides in pertinent part:

"296.020. Unlawful employment practices defined.

"It shall be an unlawful employment practice:

"(1) For an employer, because of the race, creed, color, religion, national origin, sex, or ancestry of any individual:

"(a) To fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, creed, color, religion, national origin, sex, or ancestry; or

"(b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, creed, color, religion, national origin, sex, or ancestry;"

* * * * *

"(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, creed, color, religion, national origin, sex or ancestry, unless based upon a bona fide occupational qualification or for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of his race, creed, color, religion, national origin, sex or ancestry, or to classify or refer for employment any individual on the basis of his race, creed, color, religion, national origin, sex, or ancestry."

* * * * *

"(5) For any person, whether an employer or an employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."

14. That Section One of the 14th Amendment of the United States Constitution provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15. That 42 U. S. C. Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

16. That 42 U. S. C. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

17. That 42 U. S. C. Section 2000e-2 provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

18. That Ordinance Number 51512 of the City of St. Louis, approved November 29, 1962 provides, in applicable part:

"SECTION TWO: It shall be an unlawful employment practice:

"(a) For an employer, because of race, creed, color, religion, national origin or ancestry of any individual to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * * * *

"(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication or to use any form of application for employment or to make any inquiry in connection with prospective employ-

ment, which expresses directly or indirectly any limitation, specification, or discrimination because of race, creed, color, religion, national origin, or ancestry, unless based upon a bona fide occupational qualification."

19. That Ordinance Number 57173 of the City of St. Louis, approved April 2, 1976, provides in applicable part:

"Section Nine. Discriminatory practices—Discriminatory practices, as hereinafter defined and established, are hereby prohibited and declared unlawful:

(a) **DISCRIMINATION IN EMPLOYMENT**—It shall be unlawful employment practice:

"1) For an employer to fail or refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to compensation or the terms, conditions, or privileges of employment, because of race, creed, color, age, religion, sex, national origin or ancestry.

* * * * *

"4) For an employer, labor organization, or employment agency to print or circulate or cause to be printed or circulated any placement advertisement or publication or to make any inquiry in connection with prospective employment which expresses directly or indirectly any preference, limitation, specification, or discrimination because of race, creed, color, age, religion, sex, national origin, or ancestry, unless based upon a bona fide occupational qualification."

20. That the Board, Board members, Defendant, Wentz, and Defendant, Neel, are currently engaged in acts in violation of

the aforesaid policy and procedures, Constitutional Amendment, Federal and State Statutes, and City Ordinances, in the following respects:

- a) That they are assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.
- b) That they are assigning, reassigning, and transferring employees without regard to grade level, subject matter area, position for which the employee is best suited by qualification and experience, available existing vacancies, school and locality preferences, residence of the employee, and transportation facilities.
- c) That they are discriminating against employees with respect to terms, conditions, or privileges of employment because of the employee's race, color, ancestry, and national origin in assigning, reassigning, and transferring employees.
- d) That they are limiting, segregating, and classifying employees in a way which adversely deprives and tends to deprive employees of employment opportunities and adversely affects employee status by assigning, reassigning, and transferring employees based on their race, color, ancestry, and national origin.
- e) That they are maintaining, using, printing, and circulating statements, advertisements, and publications which express limitations, specifications, and discrimination based on race, color, ancestry, and national origin in that black and white employees are being assigned, reassigned, and transferred to locations from separate lists based exclusively on the race, color, ancestry, and national origin of the employees.
- f) That the Defendants have predetermined which of its employees will be assigned, reassigned, and transferred

based on the race, color, ancestry, and national origin of the employees and has and is inciting, compelling, and coercing employees to accept the discriminatory assignments, reassessments, and transfers.

21. That Plaintiffs have received a notification that they will be transferred, reassigned, or assigned based exclusively on their race.

22. That the Board currently intends to transfer, assign, or reassign approximately 648 employees prior to the opening of the 1978-79 school year, based exclusively on their race.

23. That Plaintiffs believe on their best information that the Board, Board members, Defendant, Wentz, and Defendant Neel, have authorized, instructed, or caused several hundred other employees to be assigned, transferred, or reassigned, based exclusively on their race.

24. That Plaintiffs bring this suit on behalf of themselves and all employees of the Board; that the Board has in excess of seven thousand (7,000) employees; and that those persons who are affected by this decision are too numerous to be named individually, and that the Plaintiffs herein fairly and adequately represent the class of employees of the Board.

WHEREFORE, Plaintiffs pray an order of this Court:

(A) Designating them as representatives of the class of employees of the Board affected by Board policies and actions as above described;

(B) Adjudging that the actions, policies, and practices of the Board, Board members, and Defendants, Wentz and Neel, of assigning, transferring, or reassigning employees based on their race, are illegal, invalid, and unconstitutional, and con-

trary to the laws of the State of Missouri, the United States, and the City of St. Louis;

(C) Awarding them attorney's fees and the reimbursement of all costs expended in this cause; and

(D) For such other orders as to this Honorable Court shall seem meet and just.

Count II

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I.

2. That unless restrained or enjoined by this Court, Defendants, Board, Board members, Wentz and Neel, will continue to unlawfully and illegally discriminate against employees and will order and carry out their discriminatory practices of assignment, reassignment, and transfers.

3. That the Plaintiffs and the class which Plaintiffs represent have an adequate remedy at law.

WHEREFORE, Plaintiffs pray an order of this Court:

(A) Ordering and directing the Defendants, Board, Board members, Wentz, and Neel, to show cause why they should not be restrained from assigning, transferring, or reassigning employees based on their race;

(B) For a preliminary injunction;

(C) Upon a full hearing on the merits, for a permanent injunction prohibiting, restraining, and enjoining Defendants, and each of them, from assigning, reassigning, or transferring, or attempting to assign, reassign, or transfer employees based on their race;

(D) That the Court further award the Plaintiffs attorney's fees and all costs expended in this cause; and

(E) For such other relief as to this Court might seem meet and just.

Count III

1. Plaintiffs reallege each and every allegation contained in Paragraphs 1 through 24 of Count I and Paragraphs 1 through 3 of Count II.

2. That the Defendants, Board, Board members, Wentz, and Neel, have by their actions and attempted actions, damaged the Plaintiffs and all members of the class which they represent. And against whom the Defendants have already discriminated by assigning, reassigning, or transferring, in the amount of Ten Million and No/100 Dollars (\$10,000,000.00).

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the class which they represent, pray judgment against the Defendants, and each of them:

(A) In the amount of Ten Million and No/100 Dollars (\$10,000,000.00);

(B) For attorney's fees;

(C) For their costs expended in this cause; and

(D) For such other relief as might be just.

/s/ CHARLES R. MURPHY
/s/ REBA VISCUSO
/s/ ELLEN BORDERO
/s/ ROSALIND STEEL
/s/ BETTY TURLEY
/s/ VIRGIL KOLODGIE
/s/ FLORENCE CLARIDGE
/s/ MARVIN CRADER
/s/ VIRGINIA NORRIS

Subscribed and sworn to before me this 9th day of June, 1978.

/s/ ANTHONY J. SESTRIC
Notary Public

My Commission Expires: August 26, 1980

FORDYCE & MAYNE
By /s/ ANTHONY J. SESTRIC
120 South Central, Suite 1100
St. Louis, Missouri 63105
(314) 863-6900
Attorneys for Plaintiffs

EXHIBIT 3

State of Missouri
City of St. Louis }^{ss.}

In the Circuit Court of the City of St. Louis
State of Missouri

Cause No. 782-4280
Equity Division No. 3

Charles Murphy, Reba Viscuso, Ellen Bordero, Rosalind Steel,
Betty Turley, Virgil Kolodgie, Florence Claridge, Marvin
Crader, and Virginia Norris,

Plaintiffs,
vs.

The Board of Education of the City of St. Louis, a Public
Corporation, Serve: Mr. Robert E. Wentz, Superintendent of
Schools, 911 Locust Street, St. Louis, Missouri,
and

Gordon L. Benson, Anita L. Bond, Frederick E. Busse,
Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence
E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C.
Springer, Marjorie M. Weir, and Donald W. Williams, Constituting
and Being Members of the Board of Education of the
City of St. Louis, Serve at: 911 Locust Street, St. Louis, Missouri,

and

Robert E. Wentz, Superintendent of Schools, 911 Locust Street,
St. Louis, Missouri,

and

Burchard Neel, Jr., Associate Superintendent of Schools, 911
Locust Street, St. Louis, Missouri,

Defendants.

ORDER TO SHOW CAUSE

On reading and filing the Petition in this cause and on
Motion of Plaintiffs,

IT IS ORDERED that the above-named Defendants, Board of Education of the City of St. Louis, Gordon L. Benson, Anita L. Bond, Frederick E. Busse, Henry M. Grich, Betty Klinefelter, Lawrence Moser, Lawrence E. Nicholson, Daniel L. Schlafly, Marjorie Smith, Dorothy C. Springer, Marjorie M. Weir, Donald W. Williams, Robert E. Wentz, and Burchard Neel, Jr., show cause before this Court on the 29th day of June, 1978 at 9:30 a.m. or as soon thereafter as counsel can be heard in Division 3 for the Circuit Court of the City of St. Louis, at the Courthouse in the City of St. Louis, State of Missouri, why a preliminary injunction should not issue during the pendency of said action, according to the prayer of such Petition; and

It appearing to the Court's satisfaction that a proper case is presented for the issuance of an order to show cause in the place and stead of the usual notice of motion, it is hereby ordered and directed that service of this order to show cause and of the papers on which the same has been granted on the Defendants on or before the 29th day of June, 1978, shall be held sufficient notice of motion herein and the application for a preliminary injunction herein.

It Is Further Ordered that the Clerk of this Court be hereby directed to cause certified copies of this order to be made, and that a copy of the Petition and a copy of this order be served on the above-named Defendants.

/s/ (Illegible)

Presiding Judge—Division No. 3

Dated this 12th day of June, 1978.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 12th day of June, 1978.

JOSEPH P. RODDY
Circuit Clerk
/s/ By JULIAN BUCK
Deputy Clerk

(Seal)

APPENDIX 4

In the United States District Court for the Eastern District of Missouri, Eastern Division

Charles Murphy, et al., Plaintiffs,
v. _____ Cause No.
The Board of Education of The City of St. Louis, et al., Defendants. } 78-0628-C(1).

MOTION TO REMAND TO STATE COURT

Come now the Plaintiffs and move this Honorable Court for an order remanding this cause of action to the state court, and in support thereof state as follows:

1. Defendants herein, on the 23rd day of June, 1978, filed their Petition for Removal of this cause from the Circuit Court of the City of St. Louis, State of Missouri.
2. That in their Petition for Removal, Defendants stated that this cause arose under the Constitution, laws, or treaties of the United States.
3. That the Defendants alleged that this cause of action was removable to the Federal District Court under the provisions of 28 U.S.C. 1441.
4. That the Plaintiffs herein allege that this cause of action is *not* subject to the original jurisdiction of the Federal District Court under the provisions of 28 U.S.C. 1331.

5. That Plaintiffs further allege that there are *no* separate and independent claims or causes of action which are removable if sued upon alone.

6. That this cause was therefore improperly removed to the Federal District Court and should properly be remanded to the Circuit Court of the City of St. Louis for further proceeding.

WHEREFORE, Plaintiffs pay an order of this Honorable Court remanding this cause of action to the Circuit Court of the City of St. Louis for further proceedings and an order awarding Plaintiffs in this cause their costs incurred in this Court by reason of such removal.

FORDYCE & MAYNE
/s/ By ANTHONY J. SESTRIC
120 South Central, Suite 1100
St. Louis, Missouri 63105
(314) 863-6900
Attorneys for Plaintiffs

A copy of the above and foregoing Motion to Remand to State Court served upon Defendants, this 27th day of June, 1978 by depositing the same in the United States mail, postage prepaid, addressed to Mr. Paul B. Rava, Lashly, Caruthers, Thies, Rava & Hamel, Attorneys at Law, Paul Brown Building, 818 Olive Street, Suite 1300, St. Louis, Missouri 63101, Attorney of Record for Defendants.

/s/ ANTHONY J. SESTRIC

APPENDIX 5

United States District Court
Eastern District of Missouri

July 10, 1978

Charles Murphy, et al. }
vs. } No. 78-06280C(1)
The Board of Education of }
The City of St. Louis, et al. }

MEMORANDUM FOR CLERK

Defendants move to amend their petition for removal by interlineation and to insert the words "and Sections 1343(3) and (4)" in paragraph 3 of the said petition after the words "Section 1331" and by inserting the words "and Section 1443 (2)" in the same paragraph 3 after the words "Section 1441".

LASHLY, CARUTHERS, THIES, RAVA
& HAMEL, a Professional Corporation
By /s/ PAUL B. RAVA
Attorneys for Defendants
818 Olive Street, Suite 1300
St. Louis, Missouri 63101

cc: Mr. Anthony J. Sestruc
Attorneys for Plaintiffs

.....
Plaintiff
Attorneys for
Defendant

APPENDIX 6

In the United States District Court
Eastern District of Missouri
Eastern Division

Charles Murphy, et al.,
Plaintiffs,
v.
The Board of Education of The
City of St. Louis, et al.,
Defendants.

No. 78-0628-C(1)

MOTION OF DEFENDANTS THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., TO DISMISS THIS ACTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND SUGGESTIONS IN SUPPORT

The Board of Education of the City of St. Louis, its members, the Superintendent and Associate Superintendent, all named herein as defendants, move this Honorable Court to dismiss the instant action for failure to state a claim upon which relief may be granted. As grounds for this Motion, defendants state:

The gravaman of plaintiffs' petition, filed in the Circuit Court of the City of St. Louis on June 12, 1978, is that defendants violated and are violating the Fourteenth Amendment to the Constitution of the United States and other civil rights legislation by reassigning teachers and other staff personnel on the basis of their race. The petition further avers that the reassessments contemplated to be effective at the beginning

of the 1978-79 school year will involve about 648 employees out of a total of over 7,000 employees.

The petition prays for a permanent injunction prohibiting the defendants from any and all such reassessments, and for \$10,000,000.00 damages.

Plaintiffs are barred by laches and are estopped from making the claims asserted in their petition.

In substance, the petition is grounded on the alleged illegality of the actions taken by defendants in order to comply with the specific provisions of paragraph 5 of the Consent Judgment and Decree entered by this Court on December 24, 1975 in *Liddell, et al. v. Board of Education, et al.*, 72C 100(1). No reference to the Decree and other proceedings in the *Liddell* case is a glaring and meaningful omission in the petition of the plaintiffs.

Opportunity to intervene was given by the Court to any interested party in its Order of October 3, 1973, which was published in the St. Louis Daily Record for four weeks, beginning October 10, 1973 with notices to all television and radio stations. As this Court noted in its Order of June 21, 1974, no party [present plaintiffs included] requested intervention.

Contemporaneously with the entry of the Consent Judgment and Decree on December 24, 1975, this Court ordered the publication of a notice containing the text of the proposed Decree and giving to all interested parties [including the present plaintiffs] an opportunity to file objections and to be heard at a hearing scheduled for January 23, 1976. The record shows that some parties sought to intervene, and others filed objections, but the present plaintiffs did not do either. In particular, the St. Louis Teachers Union, Local 420, and the St. Louis Teachers Association and the Missouri State Teachers Association, St. Louis District, filed separate objections to the provisions of the Decree regarding the transfer of teachers.

In its Order of January 23, 1976 this Court denied all the objections. The Court also ordered that the School Board adopt a policy of transfer of personnel which was worked out in consultation with the Union and filed in Court on March 15, 1976. No appeal was taken by any of the teachers' groups or an individual teacher.

The present plaintiffs are barred by laches and the principle of orderly procedures from challenging the provisions of paragraph 5 of the Consent Judgment and Decree, two years and almost five months after the cut off date set by the Court, and after the conclusion of a thirteen week trial.

Furthermore by identifying themselves with, and as the representatives of, the 7,000 Board's employees, plaintiffs subsumed their position in that of the three teachers' organizations which filed written objections to the Consent Decree and were overruled by this Court on January 23, 1976. Representatives of the employees had their day in court; they should not be allowed to reopen that closed hearing by the expedient of expanding the area of relief requested to encompass a permanent injunction and \$10,000,000.00 damages. The affidavit of Burchard Neel, Associate Superintendent in charge of personnel for the public school system, which is attached as Exhibit A to this Motion, shows that a majority of the plaintiffs herein were members either of the Union or of the Association during the period 1975-1976.

The device of moving the case from the federal court to the state court may be ingenuous but cannot defeat the orderly operation of our dual system of jurisdiction. Causes of action cannot be split either by the plaintiffs or by the defendants (compulsory counterclaim). Likewise interested parties must participate within the timetable set by the rules and the courts, and cannot await the outcome of the proceeding to assert be-

latedly what they failed to do within the required time. *Lockwood v. Hercules Powder Co.*, 7 FRD 24, 28 (W.D. Mo. 1947) shows that courts will not countenance a party to delay participating and "to gamble on the outcome" of the case.

Reassignments because of race factor in a desegregation program voluntarily undertaken by a Board of Education was held proper by the Supreme Court in *McDaniel v. Barresi*, 402 U.S. 39, which stated: "Any other approach would freeze the status quo that is the very target of all desegregation processes." (402 U.S. l.c. at p. 41)

While the *Barresi* case involved students, rather than employees, the rationale remains the same. In the recent decision of the Seventh Circuit in *Koltz, et al. v. Board of Education of the City of Chicago, et al.*, (decided June 1, 1978) (Slip Opinion attached as Exhibit B) the appellate court approved the holding below that the plaintiffs teachers were not entitled to injunctive relief from reassignment to different schools. The Seventh Circuit stated:

"the plaintiffs had failed to establish deprivation of significant constitutional rights, that is, that there is no constitutional right to a teaching position in a particular location." (Slip Opinion l.c. p. 2)

The court also rejected plaintiffs' contention "that the Board's action violates the transferred teachers' rights to equal protection of the laws by singling out certain teachers for transfer" (Slip Opinion p. 3 ft. 2).

The Seventh Circuit pointed out that under Illinois law "the Board clearly has the authority to transfer teachers." To the same effect is the law of Missouri, Mo. R.S. Sec. 168.211.2. Hence the conclusion of the Seventh Circuit is clearly applicable here:

"Absent a property interest and a legitimate claim of entitlement to the interest, the procedural safeguards of the Fourteenth Amendment simply do not apply. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972)." (Slip Opinion l.c. p. 3.)

In the present case, the contention rejected by the Seventh Circuit is further invalidated by the fact that the plaintiffs here include both black and white employees, as shown in Neel's affidavit (Exhibit B). Inconvenience because of transfers may be colorblind, but a charge of racial discrimination is inconsistent with, and cannot be targeted against, both races as the alleged victims.

Finally, it must be re-emphasized by these defendants that the transfers complained of are part of the Consent Judgment and Decree. As the Court is well aware, these defendants deny any unconstitutional conduct on their part. Nevertheless, in an attempt to settle the *Liddell* case and formulating a desegregation plan based upon the de facto segregation conditions existing in the City of St. Louis, defendants agreed to the Consent Judgment and Decree which includes a requirement to transfer personnel. As the Court of Appeals for the Eighth Circuit has indicated, this Consent Judgment and Decree is "obligatory on the respective parties." (Order denying stay of mandate in *Caldwell v. Board of Education*, 76-1228, filed January 28, 1977).

Plaintiffs' purported cause of action is not supported by case law. The Court in *Burns v. Board of School Commissioners of the City of Indianapolis, Indiana*, 302 F.Supp. 309, 312 (S.D. Indiana 1969), aff'd 437 F.2d 1143 (7th Cir. 1971), stated:

"This particular exercise of legal sophistry has been advanced before, and found wanting. To the contrary, it has been held that the carrying out of the mandate of the Supreme Court in *Brown*, the states have necessarily and

constitutionally based their desegregation plans on racial classification." (citations omitted)

For all of the reasons stated herein, it is respectfully submitted that defendants' Motion to Dismiss Plaintiffs' Petition for failure to state a claim for which relief may be granted should be sustained.

LASHLY, CARUTHERS, THIES, RAVA
& HAMEL, a Professional Corporation
By JOHN H. LASHLY
PAUL B. RAVA
KENNETH C. BROSTRON

Attorneys for Defendants
818 Olive Street, Suite 1300
St. Louis, Missouri 63101
(314) 621-2939

Certificate of Service

This is to certify that a copy of the foregoing was mailed this day of July, 1978 to Mr. Anthony J. Sestric, Attorney for Plaintiff, 120 South Central, Suite 1100, St. Louis, Missouri 63105.

.....

EXHIBIT A

State of Missouri }
City of St. Louis }

**AFFIDAVIT OF BURCHARD NEEL, JR. IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS**

Burchard Neel, Jr., being duly sworn depose and states:

1. I am a named defendant in the action entitled Charles Murphy, et al. v. The Board of Education of the City of St. Louis, et al., being cause No. 782-4280 in the Circuit Court of the City of St. Louis and cause No. 78-0628-C(1) in this court.
2. I am the Associate Superintendent in charge of Personnel for the St. Louis Public Schools, having been in Personnel as Director or similar titles at all times since 1973 and also for prior, non-consecutive periods of time.
3. Among my duties is to supervise the operation of the Personnel Division, which has administrative responsibilities over the staff of the public school system, numbering about 6,900 employees, inclusive of certificated and non-certificated personnel.
4. Our Division maintains standard records about the staff, which are kept in the regular course of the public school business. These records include type and location of assignments, race of the employee. Dues check off records for members of the Union and of the St. Louis Teachers Association are also maintained in the central office.

5. Our records show that of the nine plaintiffs in this action six are teachers, to wit, Charles Murphy, Ellen Bordero, Marvin Crader, Rosalind Steel, Betty Turley and Reba Viscuso; two are custodians, namely, Virgil Kolodgie and Florence Claridge; and one is a secretary, Virginia Norris.

6. Our records show that during the period 1975-1976 of the six plaintiffs who are teachers 3 were members of the Union Local 420 and 2 were members of the St. Louis Teachers Association.

7. Of the nine plaintiffs 2 are black (Murphy and Bordero) and the remaining 7 are white.

/s/ BURCHARD NEEL, JR.
BURCHARD NEEL, JR.

Subscribed and sworn to before me this 6th day of July,
1978.

/s/ MARY FRANCES RAYHAWK
Notary Public

My Commission expires: November 28, 1978

APPENDIX 7

United States District Court, Eastern District of Missouri, Eastern Division

Charles Murphy, et al.,
v.
The Board of Education of the City
of St. Louis, et al.,
Defendants.

Plaintiffs,

No. 78-0628-C (1)

ORDER

(Filed August 11, 1978)

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiffs' motion to remand be and is denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss be and is granted. Plaintiffs' complaint is hereby dismissed with prejudice.

Dated this 11 day of August, 1978.

/s/ J. H. MEREDITH
United States District Judge

APPENDIX 8

United States District Court, Eastern District of Missouri, Eastern Division

Charles Murphy, et al.,
v.
The Board of Education of the City
of St. Louis, et al.,
Defendants.

Plaintiffs,

No. 78-0628-C (1)

MEMORANDUM

(Filed August 11, 1978)

This matter is before the Court on the motion of plaintiffs to remand, and on the motion of defendants to dismiss for failure to state a claim. For the reasons stated hereinafter, plaintiffs' motion to remand will be denied, and defendants' motion to dismiss will be sustained.

This case was originally filed in St. Louis City Circuit Court by nine plaintiffs for alleged deprivation of constitutionally protected rights and for unfair employment practices. The petition also made class allegations on behalf of "all employees of the board" [of education]. The defendants thereafter removed to this court.

Count I seeks a declaratory judgment that defendants' actions in transferring teachers pursuant to a consent decree in *Liddell, et al. v. Bd. of Education, et al.*, Case No. 72-100 C

(1) (E.D. Mo.), are "illegal, invalid, and unconstitutional, and contrary to the laws of the State of Missouri, the United States, and the City of St. Louis."

Count II prays for a restraining order prohibiting the aforementioned transfers. Count III seeks damages of \$10,000,000.00.

The Court will first address the plaintiffs' motion to remand. Plaintiffs contend that this action is not subject to the original jurisdiction of the United States District Court under 28 U.S.C.

Section 1331 of Title 28 reads: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Section 1343 of Title 28 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Finally, Title 28 U.S.C. §1441(a) allows a defendant to remove any action brought in a state court to the district court where "the district courts of the United States have original jurisdiction."

Subparagraph (c) of that section states that "Whenever a separate and independent claim or cause of action, which would

be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction."

The question which must be answered is whether this court would have original jurisdiction of any of the plaintiffs' claims. Although the petition evidences a shotgun approach to pleading, it is apparent that the plaintiffs complain of violations of state law, §292.020, R.S. Mo.; federal law, the 14th Amendment, 42 U.S.C. §§1981, 1983, and 2000e-2; and of St. Louis City Ordinances Numbers 51512 and 57173.

Clearly the plaintiffs' claims for deprivation of rights secured under the 14th Amendment and Sections 1981, 1983, and 2000e-2 of Title 42 are claims "which would be removable if sued upon alone." 28 U.S.C. §1441(c). They would be removable because 28 U.S.C. §1343 (3) and (4) grant the district court original jurisdiction of a civil action "[t]o redress the deprivation, under color of any State law, statute, ordinance, . . . of any right, privilege or immunity secured by the Constitution . . ." or "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . ."

If the adjudication of a claim depends upon the application of either the Constitution or laws of the United States, the entire case is removable. 14 Wright, Miller and Cooper, *Federal Practice and Procedure*, Jurisdiction, §3722, page 546. *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109 (1936). 28 U.S.C. §1441 (c). Since plaintiffs are clearly alleging violations of the 14th Amendment and of various provisions of the civil rights acts of Title 42, those federal claims may be removed. Furthermore, 28 U.S.C. §1441(c) allows the district court to remove the entire case and also to determine all issues therein. *Watkins*

v. *Grover*, 508 F.2d 920, 921 (9th Cir. 1974). Therefore, plaintiffs' motion to remand will be overruled and the Court will take jurisdiction of the entire cause.

The Court will next address the defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6), F.R.C.P. Defendants contend they are merely carrying out and implementing a court approved consent decree entered in *Liddell, et al. v. Bd. of Education, et al.*, Case No. 72-100 C (1), (December 24, 1975, E.D. Mo.). The Court agrees.

Paragraph 5 of that consent order, which was approved by this Court, requires the defendants to affirmatively act to reduce the racial imbalance of *teachers* in the St. Louis City school system.

The Court is of the opinion that the teachers can state no claim, federal or otherwise, for the transfers ordered under the consent decree in *Liddell, supra*.

Under Missouri law, the school impliedly has the discretionary right to transfer teachers. See, §168.211(2), R.S. Mo. (1969). There is, therefore, virtually no probability of success on the merits of an equal protection claim where the board has such authority to transfer teachers. *Kolz v. Board of Ed. of City of Chicago*, 576 F.2d 747, 749 n.2 (7th Cir. 1978).

Also supporting this conclusion is the case of *McDaniel v. Barresi*, 402 U.S. 39 (1971). In that case litigation was commenced to raise equal protection claims of students who were reassigned schools by the school board under a voluntary program to desegregate its public schools. The Supreme Court held the plan did not offend the 14th Amendment and that the Board properly took into account race in formulating parts of the plan. *Id.* at 41. It is thereby clear that plaintiffs can state no claim under the 14th Amendment, 42 U.S.C. §§ 1981, 1983, and 2000e-2. *Id.*

Although there is no law on the issue, the Court is of the opinion that the reasoning in *McDaniel v. Barresi, supra*, and *Kolz v. Board of Ed. City of Chicago, supra*, applies by analogy to plaintiffs' claims of unlawful employment practices under state and municipal law. Both the state statute and the city ordinance contain language that closely parallels the federal statutory and constitutional law. Therefore, the Court will dismiss the state and municipal claims for failure to state a claim. There is simply no law or authority to support plaintiffs' contentions or theories.

Finally, it should be noted that the plaintiffs were given ample opportunity to intervene in *Liddell, supra*, but chose not to do so. This fact further supports the determination that plaintiffs can state no claim. See, *Black and White Children of Pontiac School System v. School District of City of Pontiac*, 464 F.2d 1030 (6th Cir. 1972).

Dated this 11 day of August, 1978.

/s/ J. H. MEREDITH
United States District Judge

APPENDIX 9

In the United States Court of Appeals
Eighth Circuit

No. 78-1608

Charles Murphy, et al.,
Appellants,
vs.

The Board of Education of the City of St. Louis, et al.,
Appellees.

MOTION FOR RECUSAL

Comes now Appellants, by counsel, and respectively move under 28 U.S.C. § 455 that the Honorable Circuit Judges Lay and Bright be recused and disqualified from presiding as judges at the appeal of the above-entitled matter.

This motion is made on the grounds that said judges participated and ruled in the case of *Liddell, et al. v. Caldwell*, 546 F.2d 768 (8 C.A., 1976), and that by the contents of the opinion issued in that cause, have disclosed that they have formed a personal bias or prejudice concerning the actions and attitudes of a party, to-wit: the Board of Education of the City of St. Louis, in the following particulars:

1. Circuit Judges Lay and Bright concluded that the Board of Education of the City of St. Louis has operated an "admittedly de jure segregated school system whose district lines have been coterminous with those of the City since 1876." (*Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, 772 (8 C.A., 1976)).

2. Circuit Judges Lay and Bright have previously ordered "in order to avoid future piecemeal appeals, we additionally direct that the district court hear, as soon as possible, any objections to the School Board's January, 1977 plan and that within a reasonable time prior to the entry of its approval, the court require that the parties submit alternate plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term." *Liddell, et al. v. Caldwell, et al.*, 546 F.2d 768, 774 (8 C.A., 1976).

And that by reason thereof, Circuit Judges Lay and Bright have prejudged and have formed opinions as to the merits or disputed evidentiary facts concerning the proceeding.

WHEREFORE, Appellants pray an order of this Honorable Court recusing and replacing Circuit Judges Lay and Bright from presiding at the hearing of the appeal of the above-entitled matter.

LAW OFFICES OF ANTHONY J. SESTRIC

/s/ By ANTHONY J. SESTRIC

1015 Locust Street, Suite 601

St. Louis, Missouri 63101

241-8600

Attorneys for Appellants

State of Missouri
City of St. Louis }

On this 2nd day of January, 1979, before me a Notary Public appeared Anthony J. Sestric, and having been duly sworn by me, stated that the above and foregoing facts and allegations are true and correct to his best knowledge and belief.

/s/ NANCY K. TROUTMAN
Notary Public

My Commission Expires August 22, 1982.

I hereby certify that a copy of the above and foregoing Motion has been served upon the Appellees by depositing the same, postage prepaid in the United States mail this 12th day of January, 1979 addressed to Mr. John H. Lashly, c/o Lashly, Caruthers, Thies, Rava & Hamel, Attorneys at Law, Suite 1300, 818 Olive Street, St. Louis, Missouri 63101, Attorney of Record for the Appellees.

/s/ ANTHONY J. SESTRIC
ANTHONY J. SESTRIC

APPENDIX 10

United States Court of Appeals
for the Eighth Circuit

78-1608

September Term, 1978

Charles Murphy, et al.,

Appellants,

vs.

The Board of Education of the City of
St. Louis, et al.,

Appellees.

} Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

Before LAY, BRIGHT and STEPHENSON, Circuit Judges.

Appellants' motion for recusal of certain Judges has been considered by the Court and is overruled.

The presenting setting of this case for oral argument and submission to a panel of Judges of the Court on Thursday, January 11, 1979 remains in full force and effect.

January 5, 1979

APPENDIX 11

United States Court of Appeals
for the Eighth Circuit

No. 78-1608

Charles Murphy, Reba Viscuso, Ellen
Bordero, Rosalind Steel, Betty Turley,
Virgil Kolodgie, Florence Claridge,
Marvin Grader and Virginia Norris,
Appellants,

v.

The Board of Education of the City of
St. Louis, Gordon L. Benson, Anita
L. Bond, Frederick E. Busse, Henry
M. Grich, Betty Klinefelter, Lawrence
Moser, Lawrence E. Nicholson, Daniel
L. Schlaflly, Marjorie Smith, Dorothy
C. Springer, Marjorie M. Weir and
Donald W. Williams, Constituting and
Being Members of the Board of Edu-
cation of the City of St. Louis and
Robert E. Wentz and Burchard Neel,
Jr.,

Appellees.

Submitted: January 11, 1979

Filed: January 19, 1979

Before LAY, BRIGHT, and STEPHENSON, Circuit Judges.

PER CURIAM.

This is an appeal from a dismissal of plaintiff's complaint by the district court. We affirm the judgment of dismissal for the reasons set forth in the district court's opinion.

The judgment of the district court is affirmed.

Attest:

A true copy.

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX 12

United States Court of Appeals
for the Eighth Circuit

No. 78-1608

September Term, 1978

Charles Murphy, et al.,

Appellants,
vs.
The Board of Education of the City of
St. Louis, et al.,
Appellees.

} Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 6, 1979
